No. 52744-8-II
Pierce County Superior Court No. 17-2-08077-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DONALD HERRICK,

Plaintiff/Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS) and the SPECIAL COMMITMENT CENTER (SCC),

Defendant(s),

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable G. Helen Whitener, Judge

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Plaintiff pro se[1] Donald Herrick submitted a series of Public Records requests to the Department of Social and Health Services (DSHS) and Special Commitment Center (SCC) that were consistent with the both the PRA and RCW 42.56. These requests were variously mismanaged and responses were not fulfilled consistent with the PRA or RCW 42.56. Plaintiff then filed a PRA complaint. The PRA trial court subsequently and erroneously granted summary judgment to the SCC on one claim (2015-PRR-889) and as well ruled in Plaintiff's favor on another (201605-PRR-833) but did not order an adequate penalty consistent with the applicable law. This court should reverse the trial court rulings.

B. ASSIGNMENTS OF ERROR

201512-PRR-889

1. The trial court erred in abusing it's discretion by specifically granting partial summary judgment (in the courts June 27, 2018 Corrected Order Granting The Defendant's Summary Judgment In Part [hereafter "Corrected Order"]) (CP 293-95) when, as established throughout the record, and reiterated below, the Public Records that Plaintiff requested **1)**

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1 "Courts are to liberally construe the 'inartful pleading' of pro se litigants" Boag v. MacDougall, 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982); "It is settled law that the allegations of (a pro se litigant's complaint) 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers" Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 175, 66 L. Ed.2d 163, (1980) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L. Ed.2d 652 (1972); see also Noll v. Carlson, 809 F.2d 1446, 1448 "Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel"; Ashelman v. Poep, 793 F.2d 1072, 1078, (9th. Cir 1986) "We hold [plaintiff's] pro se pleadings to a less stringent standard than formal pleadings prepared by lawyers."

were not exempt from release under any portion of the PRA; **2)** had no existence of privacy rights; **3)** certainly there was no individual privacy right invoked by ex-SCC employee Carol Olson; **4)** it was not for the state agency itself to (illegitimately) invoke an individuals privacy claim; and **5)** Plaintiff absolutely had a legitimate reason to obtain the sought after records given that he was **a)** involved in the investigation as the alleged victim of ex-SCC employee Carol Olson; **b)** confined in a total confinement facility in which his day to day behavior and subsequent evaluations played an integral part of his hopeful release from a potential lifetime of commitment and said investigation would act as a lens through which forensic staff would view Plaintiff and greatly influence their opinion; **c)** Plaintiff still maintains a legitimate interest in obtaining said records while being on DOC Community Custody and required to participate in sex offender treatment with which the SCC allegations are within the potential sphere of rebuke for both; and **d)** a general legitimate reason exists for any member of the public to know about individuals being abused under the states care. Plaintiff's position is supported by both the law and thoroughly established case law on the issue. The SCC/DSHS have still not provided this record.

2. The trial court erred in abusing it's discretion by granting summary judgment (see "Corrected Order") (CP 293-95) when there remains questions of material fact as to the official discharge of SCC/DSHS's

obligations under the Public Records Act (PRA) for these specific requests.

3. The trial court erred in abusing it's discretion by granting summary judgment (see "Corrected Order") (CP 293-95) when Plaintiff Donald Herrick did in fact state a cognizable and legitimate claim under the PRA for these specific requests.

201605-PRR-833

4. The trial court erred in abusing it's discretion when it awarded an inadequately low (daily) penalty amount (see the Courts "Trial Decision"). (CP 594-97).

5. The trial court erred in abusing it's discretion when it awarded an inadequately low (daily) penalty amount that is insufficient to act as a deterrent to SCC in order to discourage future violations (see the Courts "Trial Decision"). (CP 594-97).

6. The trial court erred in abusing it's discretion when it awarded an inadequately low (daily) penalty amount without factoring Plaintiffs articulated aggravating/mitigating filings (per *Yousoufian*) (see the Courts "Trial Decision"). (CP 594-97).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Is Plaintiff Donald Herrick entitled to relief from the trial court order granting summary judgment for request 2015-PRR-889 where it was clearly contradicted by the facts, record of the case and the PRA/law and as well applicable case law?

Is Plaintiff Donald Herrick entitled to relief from the trial court order awarding an inadequately low (daily) penalty determination for 201605-PRR-833 where it was clearly contradicted by the facts, record of the case and the PRA, law and as well applicable case law and did not offer an adequate deterrent effect and did not address Plaintiffs filings on any of the *Yousoufian* factors?

D. STATEMENT OF THE CASE

Plaintiff pro se Donald Herrick was a pretrial civil detainee whom, until a month ago, was confined at the SCC and whom faced a potential lifetime of total confinement through civil commitment proceedings under RCW 71.09. In December 2015 Plaintiff submitted several Public Records requests (via the PRA and RCW 42.56) to the SCC/DSHS in order to help in his civil commitment proceedings. Given the numerous actions and/or inactions and unreasonable policies, by and of the SCC/DSHS, that are incompatible with the PRA and RCW 42.56 Plaintiff was compelled to file a complaint under the PRA.

E. 201512-PRR-889 ARGUMENT

> **Because of the SCC's numerous actions and/or inactions that were contrary to the PRA, RCW 42.56, applicable case law and plaintiff's specific requests, including, but not limited to, the unresolved questions of material fact, the trial court should not have granted the SCC's motion for summary judgment where there was clearly no 1) privacy right invoked by the individual; 2) privacy cannot be invoked by the agency; 3) and "privacy" did not exist in passport type employment photograph; 4) Plaintiff most certainly had an individual legitimate interest in receiving records; 5) the public in general has a legitimate interest in records that pertain to state**

employees abusing those in their care; 6) there existed no applicable exemption for SCC/DSHS to deny the request; and 7) no detailed explanation for the exemption was offered the trial court abused it's discretion.

"In reviewing a trial courts decision to grant summary judgment we review questions of law de novo. We consider all facts and reasonable inferences in the light most favorable to the nonmoving party" *Cawdry v. Hanson Baker Ludlow Drumheller*, P.S. 129 Wn. App. 810, 120 P.3d 605. "A trial court abuses its discretion if the nonmoving party raises a genuine issue of material fact and the trial court fails to resolve the disputed issues of fact" *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*,79 Wn.2d 12,26, 482P.2d715 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47 ,940 P. 2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." *State v. Neal*, 144 Wn.2d, 600, 609, 30 P.3d 1255 (2001).

Under Civil Rule (CR) 56(c), a complaint may be dismissed on a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." A dismissal under this rule involves a question of law which is reviewed de novo by an appellate court. See Lamora v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). "This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party..." see Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Perhaps most on point is the language from Keck v. Collins, 181 Wn. App. 67, 86-7, 325 P.3d 306 (Wash. App. Div. 3) (2014):

> "In a seminal case, our Supreme Court held, 'We feel impelled to set aside the summary judgment, lest there be evidence available that will support the plaintiff's allegations.' ▶ Preston v. Duncan, 55 Wash. 2d. 673, 683, 349 P.2d 605 (1960). After all
>
> > 'summary judgment procedure is a liberal measure, liberally designed for arriving at the truth. It's purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.'
>
> Id. (quoting ▶ Whitaker v. Coleman, 115 F.2d 305, 307, (5th Cir. 1940)); see also ▶ Barber [v. Bankers Life & Cas. Co.] 81 Wash. 2d. 140, 144, 500 P.2d 88 ('The object and function of summary judgment is to avoid a useless trial. A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.'); ▶ Babcock v. State, 116 Wash. 2d. 596, 599, 809 P.2d 143 (1991) ('Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial')."

And as well more specifically on point with this claim is Sargent v. Seattle Police Dep't, 179 Wash.2d 376, 385, 314 P.3d 1093 (2013) (citing RCW 42.56.030); Hearst Corp. v. Hoppe, 90 Wash.2d 123, 127, 580 P.2d 246 (1978):

> The PRA mandates broad public disclosure. RCW 42.56.030 ("The

> people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."); Newman, 133 Wash.2d at 570, 947 P.2d 712; Hearst Corp. v. Hoppe, 90 Wash.2d 123, 130, 580 P.2d 246 (1978). The PRA requirement of disclosure is broadly construed and its exemptions are narrowly construed to implement this purpose. RCW 42.56.030; Cowles Publ'g Co. v. Spokane Police Dep't, 139 Wash.2d 472, 476, 987 P.2d 620 (1999); Newman, 133 Wash.2d at 571, 947 P.2d 712. Disclosure is therefore mandated unless the agency can demonstrate proper application of a statutory exemption to the specific requested information; the agency bears the burden of proof. Newman, 133 Wash.2d at 571, 947 P.2d 712 (stating that "the agency claiming the exemption bears the burden of proving that the documents requested are within the scope of the claimed exemption"); Hearst, 90 Wash.2d at 130, 580 P.2d 246 ("The statutory scheme establishes a positive duty to disclose public records unless they fall within the specific exemptions.").

Contrary to the PRA (the PRA mandates that the agency "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3), see also *Rental Hous. Ass'n of Puget Sound v. City of Des Moines,* 165 Wn.2d 525, 539, 199 P.3d 393 (2009) (citing AG Model Rules in support of ruling that agency withholding a record must provide a "brief explanation")) the SCC/DSHS first, and then the trial Court, never adequately explained, demonstrated or articulated how the decision(s) to withhold and deny my requested records of the passport style photograph, of my alleged victimizer, and ex-SCC employee, that was utilized in the investigation into my alleged victimization, is justified and comports with the PRA and established case law because the required burden is to heavy to bear as the Court/SCC/DSHS decision is 100% at odds with the on point decision in

Delong v. Parmelee (2010), 157 Wash. App. 119, 236 P.3d 936, review granted, cause remanded 171 Wash. 2D 1004, 248 P.3d 1042, on remand 164 Wash. App. 781, 267 P.3d 410 that employment identification (passport style) photographs are not protected as a privacy interest by the PRA as Plaintiff articulated in his "*Plaintiff's Countermotion For Reconsideration And Response To Defendant's Motion For Reconsideration Of Order Entered April 2, 2018*" (CP 243) and therefore there exists no legitimate justification. Thus the trial court clearly abused it's discretion by granting summary judgment.

Plaintiff will offer further elaboration pertaining to request number 201512-PRR-889 after reiteration from Plaintiff's previous pertinent filings:

A. Plaintiff's March 22, 2018 Filing
"*Plaintiff's Response To Defendants Motion For Summary Judgment*"
(CP 185-216 [quote below specifically at 194-200])

"Appropriateness of Exemption Material

No personal information was redacted with the photographs. The images were illegitimately redacted and wholly contrary to the PRA. The burden is on the agency to show a withheld record falls within an exemption, and the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request. RCW 42.56.550(1); *Sanders v. State*, 169 Wash.2d 827, 845–46, 240 P.3d 120 (2010).

In *Delong v. Parmalee* (2010), 157 Wash. App. 119, 236 P.3d 936, review granted, cause remanded 171 Wash. 2D 1004, 248 P.3d 1042, on remand 164 Wash. App. 781, 267 P.3d 410.) the courts found "disclosure of a passport-type identification photograph is not highly offensive to a reasonable person" and a passport-type identification photograph "is not the type of sensitive, personal information that the PRA intended to exclude from disclosure" (*Delong* at 157 & 955) and even further "we hold that in this case an individuals identification badge photograph is not exempt from disclosure under the privacy exemption because it is not the

type of intimate personal information the PRA intended to protect" (*Delong* at 131 & 942). This point is fully argued below. Suffice to say that SCC failed to meet any level of "appropriateness" with their redactions.

C. Plaintiff Absolutely Established That The SCC PDU Violated The PRA

2. 201512-PRR-889

"The PRA requires agencies to disclose any public record upon request unless an enumerated exemption applies" *Gronquist v. State*, 313 P.3d 416, 421, 177 Wn. App. 389 (Wash. App. Div. 2 2013) citing both *Sanders v. State*, 169 Wash. 2d. 827, 836, 240 P.3d 120 (2010) and RCW 45.56.070(1) and as well in *Gronquist* at 421 "The Burden of proof is on the agency to establish that a specific exemption applies" citing *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wash.2d. 702, 715, 261 P.3d 119 (2011). The exemption that SCC cited (RCW 42.56.23(2)) in their response to my records request does not exist. Presumably they meant RCW 42.56.230 (2?) which is also inapplicable as outlined in *Delong v. Parmalee* (2010), 157 Wash. App. 119, 236 P.3d 936, review granted, cause remanded 171 Wash. 2D 1004, 248 P.3d 1042, on remand 164 Wash. App. 781, 267 P.3d 410.):

> "The PRA contains specific exemptions from disclosure for certain categories of public records. ▶RCW 42.56.210. Specifically, ▶RCW 42.56.230(2) provides that '[p]ersonal information in files maintained for employees...of any public agency to the extent that disclosure would violate their right to privacy' is exempt from public inspection and copy in. Under the PRA, a persons right to privacy under ▶RCW 42.56.050 is violated 'only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public' ▶RCW 42.56.050."

Specifically with regards to SCC's illegitimate redaction of ex-SCC employee Carol Olson's[2] photograph *Delong* extensively addresses the "Private Information Exemption" (of RCW 42.56.050[3]) elaborating on point about state prison employees and even more specifically the release of their photographs (*Delong* at 156-159 & 954-956) by stating that "disclosure of a passport-type identification photograph is not highly offensive to a reasonable person" and a passport-type identification photograph "is not the type of sensitive, personal information that the PRA intended to exclude from disclosure" (*Delong* at 157 & 955) and even further "we hold that in this case an individuals identification badge photograph is not exempt from disclosure under the privacy exemption because it is not the type of intimate personal information the PRA intended to protect" (*Delong* at 131 & 942). Because the first privacy

2 Carol Olson's employment at the SCC ceased in 2011.

3 *Not* 42.56.040 as stated by the SCC in their DMFSJ at p. 8 **[CP 23]**

prong of RCW 42.56.050 was met the court refused to even (unnecessarily) address the second prong.

Given the overwhelmingly obvious parallels between Plaintiff's PRA claim and those outlined in *Delong*, because both deal with illegitimately denied and redacted "passport-type identification photographs" Plaintiff argues that, as with *Delong*, the first privacy prong of RCW 42.56.050 clearly does not apply to his PRA complaint either. Specifically Plaintiff's request, contrary to SCC's claim, is not "highly offensive to a reasonable person" and as such, as with *Delong*, there is no need to address the second privacy prong of RCW 42.56.050 either.

However, for further clarity, the second prong clearly does not apply either as Plaintiff's request was narrow in scope and only sought information about a known false allegation that pertained to the Plaintiff and only one specific SCC employee, Carol Olson[4], that the SCC had generated and that would be used during Plaintiff's RCW 71.09 proceedings. Given this context of my request my request is actually of "legitimate concern to the public" therefore the second (and unnecessary) prong of RCW 42.56.050 clearly does not apply either.

Regarding SCC's decision to illegitimately redact Olson's "passport-type identification" photograph "An agency cannot consider the requesters intent when determining whether public records are subject to disclosure under the PRA" (*Delong* at 151 & 952). As well "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (see RCW 42.56.080). "[T]he PRA requires state agencies to make public records available to 'any person' upon request, unless the record falls within certain specific exemptions" (further citing RCW 42.56.080) "and the statute specifically forbids intent, regardless of whether it is malicious in design, from being used to determine if records are subject to disclosure". (*Delong* at 146 & 950).

However "An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested" (RCW 42.56.540) and SCC utilized this option and afforded Olson the opportunity to make any objections that she may have had. Ex-SCC employee Olson (apparently) did not pursue an injunction/temporary restraining order or otherwise try to stop the release of any responsive materials. (See DRMTPRFPD at DEF-0000222 -as Exhibit "5" **[CP 213-214]**).

Of particular note in the letter to Olson that Defendants provided through discovery is that they conceded to having to provide the

4 It should be noted that Plaintiff had only been at the SCC for a number of weeks when this false and preposterous allegation was, without any credibility, cooked up by aimless SCC staff and ultimately disproven even the allegations remained in my file. As well Plaintiff had never once spoken to Ms. Olson and in fact did not even know who she was which is the reason for wanting to visually know of whom the accusation involved.

documents they then claim to have legitimately redacted specifically where they say "After reviewing Chapter 42.56 RCW, the public Records Act, and other laws, we decided the Department must comply with this request". (See DRMTPRFPD at DEF-0000222 -as Exhibit "5" [**CP 213-214**]).

Even if the intent of my request was nefarious, which it most certainly is not, "it is the affected employee" and not the agency "who retains the equitable statutory right to protect himself from a stated nefarious intent under the PRA". (*Delong* at 159 & 956). Beyond the fact that no exemptions apply to my request even if ex-SCC employee Olson, being the "affected employee", did want an injunction or to otherwise block the release of any responsive materials to my request "the first step is to determine whether or not the information involved is in fact within one of the PRA's exemptions" (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash.2d 243, 258, 884 P.2d 592 (1994) [PAWS]) which Plaintiff's request clearly and demonstrably does not involve.

Regarding #4 of my request the only responsive materials submitted were either **1) illegitimately redacted in clear violation of the PRA**; or **2)** of such poor quality (copy of copy etc. of photograph) to be unrecognizable (See Defendants response for 201512-PRR-889 at "000009" -Exhibit "6" [**CP 215-216**]) and thus as well was clearly in contradiction to the stated aims of the PRA's fullest assistance requirement. (See *Mechling v. City of Monroe*, 152 Wash.App. 830, 849, 222 P.3d 808 (2009)). In *Mechling* Division One of the Court of Appeals "recognized that while agencies have no statutory duty to disclose records electronically under the PRA, they do have a statutory duty to provide 'fullest assistance to inquirers'" to say the least SCC fell short of the mark.

My request was for digital format and to be on disk anyway, so there is no reason to have provided such poor quality images when digital images were the original format and it would've been easier to simply provide electronic versions as requested.

Of significant importance regarding the blatantly redacted "passport-type identification photograph" is that no personal information was redacted whatsoever with the photographs. SCC blatantly violated the PRA by distinguishing me as a requestor, and by assuming nefarious intentions and then themselves censoring/redacting the records. SCC's position is articulated with circuitous and inconsequential ramblings that are clearly meant to obfuscate the issues as no case law is even offered to bolster their errant positions regarding the redactions. The images were illegitimately redacted and wholly contrary to the PRA. The burden is on the agency to show a withheld record falls within an exemption, and the agency is required to identify the document itself and explain how the specific exemption applies in its response to the request. RCW 42.56.550(1); *Sanders v. State*, 169 Wash.2d 827, 845–46, 240 P.3d 120 (2010).

B. Plaintiff's April 18, 2018 Filing

"Plaintiff's Countermotion For Reconsideration And Response To Defendant's Motion For Reconsideration Of Order Entered April 2, 2018" (CP 254-60 [quote below specifically at 256-259])

"In my response to Defendant's motion for summary judgment I more thoroughly argued the merits of this portion of my claim (as well this is the only part Defendants ever argued during oral argument). It is this portion of the Courts order that I actively seek reconsideration of.

Plaintiff respectfully requests the Court to reconsider its grant of summary judgment in Defendants favor on the grounds that **(1)** there was an abuse of discretion; **(2)** there is no evidence or reasonable inference from the evidence (to contradict Plaintiff's position) to justify the verdict or the decision; **(3)** there is an error in law; and **(4)** substantial justice has not been done.

First, there was an **abuse of discretion**, as Plaintiff articulated at oral argument hearing and/or in his filings that **a)** employment identification (passport style) photographs are not protected as a privacy interest by the PRA[5]; **b)** Defendant's conceded the PRA requirement to disclose in their 12-29-15 letter[6]; **c)** state agencies/Defendants cannot determine or establish a persons privacy interests, only the individuals (Olson) can make a privacy determination for themselves[7]; **d)** Olson refused to object to the release of materials; **e)** I was determined by the SCC to be innocent of the salacious accusations; **f)** I have an inherent (liberty) interest, and thus, though not required, a "legitimate reason", in receiving my requested information (including to see the visually unidentified person's image of whom I was accused of being involved with for purposes of offering a defense) due to the salacious nature of the accusations and their

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5 See *Delong v. Parmalee* (2010), 157 Wash. App. 119, 236 P.3d 936, review granted, cause remanded 171 Wash. 2D 1004, 248 P.3d 1042, on remand 164 Wash. App. 781, 267 P.3d 410.) the courts found "disclosure of a passport-type identification photograph is not highly offensive to a reasonable person" and a passport-type identification photograph "is not the type of sensitive, personal information that the PRA intended to exclude from disclosure" (see *Delong* at 157 & 955) and even further "we hold that in this case an individuals identification badge photograph is not exempt from disclosure under the privacy exemption because it is not the type of intimate personal information the PRA intended to protect" (see *Delong* at 131 & 942).

6 "After reviewing Chapter 42.56 RCW, the public Records Act, and other laws, we decided the Department must comply with this request". (See Defendants responsive materials to Plaintiff's Request For Production of Documents (DRMTPRFPD) at DEF-0000222). [see **CP 213-214**].

7 "it is the affected employee" and not the agency "who retains the equitable statutory right to protect himself from a stated nefarious intent under the PRA" (see *Delong* at 159 & 956).

effect going forward in my RCW 71.09 proceedings; **g)** PRA prohibits an agency's distinction of requestors (see RCW 42.56.080); **h)** PRA prohibits an agency from utilizing the requestors intent[8] or their "*legitimate reason*" for the request in determining the appropriateness of the release of materials (see RCW 42.56.080); **i)** the responsive documents were specifically to be sent to my RCW 71.09 counsel in order to help facilitate my defense in said proceedings; and lastly **j)** though covered above it is important to point out that state employees identification (passport style) photographs are routinely released to all forms of the media under the PRA.

Second, beyond the requirement that the Court must view the record in the light most favorable to Plaintiff/nonmoving party, all inferences *do* favor Plaintiff. All of the filings and testimony of Plaintiff firmly **establish that all evidence and inferences clearly favor the Plaintiff's claims.**

Third, consistent with Plaintiff's filings and testimony, all of the relevant case law (dealing specifically with privacy issues, the status of the requesters and the agency's requirement to still provide requested materials) that was either cited by Plaintiff in his filings and/or at oral argument, firmly **establish an error in law** with regards to this claim.

Fourth, **substantial justice has not been done** because with the Defendants being granted summary judgment Plaintiff will not have a chance to address the unauthorized denial of his *significant and legitimate* records requests by the Defendants.

For the above reasons summary judgment for Defendant's is inappropriate and Plaintiff respectfully requests the Court to reconsider (and ultimately deny) the portion of its ruling granting Defendant's summary judgment on the above issue pertaining to Plaintiff's request for 201512-PRR-889, specifically the unauthorized redaction of Olson's picture and instead grant Plaintiff summary judgment on this issue as there clearly exists genuine issues of material fact to be determined etc."

The trial Court's Order (specific to 201612-PRR-889) that "The photographs of the SCC employee were properly redacted as exempt personal information of the public employees right to privacy and there was no legitimate reason for any member of the to possess the employees image" (CP 294) contained two main determinations for the basis of it's ruling. 1) "exempt personal information of the public employees right to

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8 "[T]he statute specifically forbids intent, regardless of whether it is malicious in design, from being used to determine if records are subject to disclosure" (see *Delong* at 146 & 950).

privacy" and 2) that "there was no legitimate reason for any member of the public to possess the employees image". Both of these determinations are clearly wrong and both are thus an abuse of discretion etc and should thus be overturned and remanded back to the trial Court.

As well the Court never made a determination that the release of the requested materials would be "highly offensive" which is required in order to determine privacy.

I. PRIVACY

The first determination of the Court's Order that responsive materials for 201612-PRR-889 were legitimately withheld due to "exempt personal information of the public employees right to privacy" is simply wrong. The concept of privacy—and a finding that disclosure would be highly offensive to reasonable people—requires that a person have an expectation of privacy in the information in the first place, and that expectation must be reasonable. Thus a person must establish that the information to be protected is private and not publicly available and the person has not waived his or her right to privacy. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 884 P.2d 592 (1994) Information alleged to be private must be maintained in secrecy or at least subject to efforts to keep it secret. Events occurring in public or information shared with others or learned by others is unlikely to be deemed "private" such that disclosure will be highly offensive to reasonable people.

For some historical context when the PRA was first adopted in 1972 it did not contain a definition of "privacy," although the term was used throughout the Act. It thus fell to the courts to define the term as litigation arose around the new law. Six years after the law's passage, the Washington Supreme Court first waded into the discussion in *Hearst Corp. v. Hoppe,* 90 Wn.2d 123, 580 P.2d 246 (1978).

The court looked to the law of torts and specifically the RESTATEMENT (SECOND) OF TORTS §652D, at 383 (1997)—the tort for invasion of privacy by publication of private facts—for its test. *Id.* at 135. Section 652D stated that an invasion of privacy by publication of private facts occurred when the matter publicized was ***both*** "**highly** offensive to a reasonable person" ***and*** "not of legitimate concern to the public."

After some muddling case law in 1987 the legislature responded by unequivocally amending the PRA:

> "The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court in "In re Rosier," 105 Wn.2d 606 (1986). The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and (2) agencies having public records should rely only upon statutory exemptions or prohibition for refusal to provide public records. Further, to avoid unnecessary confusion, "privacy" as used in [RCW 42.17.255, now RCW 42.56.050] is intended to have the same meaning as the definition given that word by the Supreme Court in "Hearst v. Hoppe," 90 Wn.2d 123, 135 (1978)."

Laws of 1987, ch. 403, §1.

Thus, since 1987 it has been clear that privacy in the PRA means that the information disclosed is **both** 1) **highly** offensive to a reasonable person **and** 2) of no legitimate public concern. **A party seeking to withhold information based on privacy must meet both prongs of this test**. *See Bainbridge Island Police Guild v. City of Puyallup,* 172 Wn.2d 398, 417, 259 P.3d 190 (2011).

RCW 42.56.050 adopted the same test for privacy as the court had set forth in *Hearst Corp.,* the one drawn from the RESTATEMENT (SECOND) OF TORTS §652D and the tort of publication of private facts:

> A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

Further, under RCW 42.56.050, "the use of a test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted." *Dawson v. Daly,* 120 Wn.2d 782, 795, 845 P.2d 995 (1993) (citing *Brouillet v. Cowles Publ'g Co.,* 114 Wn.2d 788, 798, 791 P.2d 526 (1990)); *Koenig v. City of Des Moines,* 158 Wn.2d 173, 182, 142 P.3d 162, 167 (2006). This is blatantly contrary to the trial court's order that the redactions (of the photograph) were proper as "exempt personal information of the public employees right to privacy"[9]. Rather, the *Dawson* test balances the public's interest in disclosure against the public's

9 Beyond that is the fact that **1)** the agency (SCC/DSHS) cannot assert a privacy right for an individual and **2)** ex-SCC employee Carol Olson refused to assert any privacy rights when given notice and the opportunity by SCC/DSHS when they were then conceding that they had to provide the unredacted photo. (CP 130-31).

interest in efficient government. It is a public interest versus public interest balancing, not a public versus private interest test. **The burden is on the opponent of disclosure to show that public interest weighs in favor of withholding the public record.** See *Dawson,* 120 Wn.2d at *798; Brouillet,* 114 Wn.2d 788. See *also Cowles Publ'g Co. v. Pierce Cnty. Prosecutor's Office,* 111 Wn.App. 502, 511, 45 P.3d 620 (2002). **SCC/DSHS has failed and/or refused to meet this burden.**

In the trial Court filings SCC/DSHS didn't even offer an accurate argument for the circumstances of the case to meet the statutory definition under 42.56.050 - "only if disclosure of information about the person: (1) Would be *highly offensive* to a reasonable person" - instead SCC/DSHS stated:

> "Disclosure of the photograph of the employee to Mr. Herrick would have been *offensive* to a reasonable person and there is no legitimate public concern for the photograph of the employee. This constitutes an invasion of privacy as defined by RCW 42.56.050 and therefore the exemption was appropriate." (CP 25). "The right to privacy is violated where disclosure of the information would be *offensive* to a reasonable person and is not of legitimate concern to the public. RCW 42.56.040." (CP 23) (emphasis added).

Nor did the Court ever make a determination that the release of the requested materials would be "***highly*** *offensive*" which is required in order to determine privacy. *See Bainbridge Island Police Guild v. City of Puyallup,* 172 Wn.2d 398, 417, 259 P.3d 190 (2011) and *Hearst Corp. v. Hoppe,* 90 Wn.2d 123, 580 P.2d 246 (1978). Thus the trial Court abused it's discretion.

Further pinning down the definition and/or concept of privacy in *Van Buren v. Miller,* 22 Wn.App. 836, 592 P.2d 671, *review denied,* 92 Wn.2d 1021 (1979), the Court of Appeals held that unrecorded farmland lease data used by a property assessor in assessing the value of farmland, including the names of lessors and lessees, could not be exempt under the PRA. The court looked to the *Restatement* commentary cited in *Hearst Corp.* and held that only personal private information—the kind of information not disclosed to others—could be exempt. *Id.* at 843-44. The court noted that the names of the lessors and lessees were known to at least three parties—the lessor, the lessee, and the assessor and her staff—and so could not be deemed "private." *Id.* at 844-45. Similarly in the instant case ex-SCC employee Olson's image could not be deemed "private" just as was determined in *Delong v. Parmalee* even if she were to have protested its release -which again she did not.

To bring the privacy issue to close in *Parmelee* the Court recognized that DOC inmate *Parmelee* intended to do bad things with the photos i.e. "superior court found that the photographic images Parmelee sought were exempt because disclosure would violate the employees' right to privacy under RCW 42.56.050 based on Parmelee's intended use and, as a result, enjoined disclosure of the 2,525 photographs". At 127. However *Parmelee* states further:

> "But a passport-type identification photograph is not the type of sensitive, personal information that the PRA intended to exclude from disclosure. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 136, 580 P.2d 246 (1978) (identifying examples of private information,

> including sexual relations; family quarrels; unpleasant or disgraceful or humiliating illnesses; or intimate, personal letters). As Parmelee points out, the information revealed by a public employee's photograph on his or her government identification badge is decidedly public: it is information that the employee reveals to colleagues, friends, and strangers on a daily basis. *See Sheehan*, 114 Wn. App. at 342 (holding that a public disclosure request for all officers in King County did not violate officers' right to privacy because the information was already public). Moreover, it is an image that could be captured (but not necessarily disseminated) legally by any member of the public or the media while the employee is walking down the street. *Sheehan*, 114 Wn. App. At 342....
>
> "Perhaps more important, the PRA contains specific provisions listing what type of employment information is exempt from public disclosure, including employment applications, resumes, employees' residential addresses and telephone numbers, e-mail addresses, Social Security numbers, and emergency contact information. *See* former RCW 42.56.250 (2006). The legislature did not include identification badge photographs in this list. *See Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 280, 4 P.3d 808 (2000) (refusing to read an implied exemption into the PRA because "[w]here a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions"). Generally, disclosure of a passport-type identification photograph is not highly offensive to a reasonable person and, as a result, we do not reach the second element of the privacy analysis: whether disclosure of the DOC employees' photographs is a legitimate public concern. RCW 42.56.050."

Parmelee at 136.

As with any exemption conditioned on the violation of a person's privacy rights, this exemption must be read in conjunction with RCW 42.56.050, the statutory definition of "privacy" contained in the PRA. RCW 42.56.230(3) only authorizes withholding "personal information" that "(1) [w]ould be **highly** offensive to a reasonable person, ***and*** (2) is not of legitimate concern to the public." RCW 42.56.050 (emphasis added). It is not enough that disclosure of such personal information "may cause inconvenience or embarrassment to public officials or others." RCW

42.56.550(3). For the above reasons the trial Court abused it's discretion in granting SCC/DSHS summary judgment. (Emphasis added).

II. LEGITIMACY

The second erroneous determination of the Court's Order, dealing specifically with legitimacy and that responsive materials for 201612-PRR-889 were legitimately withheld due to the trial Court's opinion that "there was no legitimate reason for any member of the public to possess the employees image", was, through overlap, significantly dealt with in Plaintiff's above argument addressing "privacy".

To tie things up however the only reason for Plaintiff's records request for the passport style employee identification photograph was due to the accusations against the ex-SCC staff member who was accused of victimizing the Plaintiff -surely state employee's victimization of those under their care would be of the public's legitimate interests.

Further establishing legitimacy is the fact that I too was part of the investigation and so too have a vested and legitimate interest in determining the circumstances of the investigation and as well the identity of my alleged victimizer both from Plaintiff's positions of **1)** my past and then current (and retroactive) position during the course of my stay at the SCC and; **2)** a legitimate future and prospective concern due to my still active DOC Community Custody status and ongoing involvement with my sex offender treatment provider (SOTP) in which the topic has already been discussed with both DOC and my SOTP and may be so again in the

future. As well there is the unfortunate possibility that Plaintiff may be returned to the SCC under RCW 71.09 and so there is absolutely still "legitimate" interest from Plaintiff.

The only potentially legitimate time that the issue of SCC's determination of the appropriateness of me to possess the picture of ex-SCC employee Carol Olson would have been ripe was completely outside of the PRA and was for SCC, as a **facility**, and with their own internal policies regarding appropriateness, to decide if I should be allowed to possess the responsive materials **after** SCC/DSHS, as **state agencies**, fulfilled their compliance with RCW 42.56 and the PRA and released the responsive materials to Plaintiff (see *Livingston v. Cedeno*, 186 P.3d 1055 (Wash., 2008) for an agency's requirement to provide materials that a prison may then refuse). SCC the *facility* may decide that the materials provided pursuant to RCW 42.56 were inappropriate for me to possess *after* the *agency* complied with the PRA. This point was never pursued and/or articulated by SCC/DSHS and would have been misplaced regardless as per my PRA request responsive materials were directed to be sent to my counsel and NOT to me.

My "legitimate concern" for the requested records is established throughout the record as legitimate and absolutely nothing in the record delegitimizes my concern, the agency has not met their burden of establishing that a withheld record falls within an exemption or the requirement to identify the document itself and explain how the specific

exemption applies in its response to the request. RCW 42.56.550(1); *Sanders v. State*, 169 Wash.2d 827, 845–46, 240 P.3d 120 (2010).

III. SUMMARY OF 201512-PRR-889

As with any exemption conditioned on the violation of a person's privacy rights, this exemption must be read in conjunction with RCW 42.56.050, the statutory definition of "privacy" contained in the PRA. RCW 42.56.230(3) only authorizes withholding "personal information" that "(1) [w]ould be **highly** offensive to a reasonable person, *and* (2) is not of legitimate concern to the public." RCW 42.56.050 (emphasis added). It is not enough that disclosure of such personal information "may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).

The state Supreme Court has declared that disclosure of employee Social Security numbers is highly offensive and of no legitimate public concern and thus exempt under RCW 42.56.230(3). *See Prog. Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 254, 884 P.2d 592 (1994). In 2005, the legislature specifically exempted public employees' Social Security numbers, adding it to RCW 42.56.250(3). RCW 42.56.250(3) further exempts:

> "[t]he following information held by any public agency in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency: Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of

> employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency"

The legislature, addressing the statutes then shortcomings regarding public employee privacy, in their full, deliberative and concise actions never extended any privacy protections to an employees passport style identification photograph -not even after the *Delong* decision[10], the only case law on point regarding public employee privacy rights of their passport style photograph did the legislature change or otherwise address the issue extending any privacy interests to public employees passport style identification photographs. For the SCC/DSHS to over rule the legislature and the Courts is clearly a violation of the PRA and for the trial Court to also do so is an absolute abuse of discretion.

F. <u>201605-PRR-833 ARGUMENT</u>

> **The trial court abused its discretion by 1) awarding such a low daily penalty amount 2) without factoring in Plaintiff's filings on aggravating/mitigating factors (per *Yousoufian*) and that 3) awarding such a low daily penalty amount was not an effective deterrent to DSHS -all of which are contrary to the PRA, RCW 42.56 and applicable case law.**

Trial court's determination of appropriate daily penalties for violation of Public Records Act (PRA) is properly reviewed for an abuse of discretion. RCW 42.56.550(4).

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10 *Delong* specifically determined that prison guards passport style photograph must be released through the PRA and that no privacy protections applied and in doing so also addressed the previous legislative changes made to statutorily recognize and bolster state employee privacy.

A trial court's determination of daily penalties under the PRA is reviewed for abuse of discretion. *Yousoufian II*, 168 Wn.2d at 458. Discretion is abused if the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* Although the Supreme Court's *Yousoufian II* decision set forth a nonexclusive list of aggravating and mitigating factors relevant to the penalty analysis, trial courts retain "considerable discretion" to set PRA penalties. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 279, 372 P.3d 97 (2016).

Plaintiff will now offer further elaboration pertaining to request number 201605-PRR-833 after also offering reiteration from his previous filings:

A. Plaintiff's August 16, 2018 Filing: "*Plaintiff's Motion For Penalty Determination Pertaining To Claims Under Request 201605-PRR-833*" (CP 482-92 [quote below specifically at 484-491])

III. Legal Arguments

Here, the undisputed facts show that the Defendants willfully failed to comply with their duties under the PRA with the Plaintiff's public records requests for **806 days** (as of 08-09-2018) (and counting).

A. Penalty Determination Under *Yousoufian*

The PRA requires imposition of per diem penalties up to $100 per day whenever a violation is found. RCW 42.56.550(4). Though the assignment of a penalty within this range is subject to the discretion of the court The Supreme Court of Washington has set forth guidelines (establishing principal, aggravating and mitigating factors etc.) for use in determining an appropriate penalty for a PRA violation. See *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 459–67, 229 P.3d 735 (2010)[11].

11 "In our view, **mitigating factors** that may serve to decrease the penalty are **(1)** a lack of clarity in the PRA request, **(2)** the agency's prompt response or legitimate follow-up inquiry for clarification, **(3)** the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, **(4)** proper training and supervision of the agency's personnel, **(5)** the reasonableness of any explanation for noncompliance by the agency, **(6)** the helpfulness of the agency to the requestor, and **(7)** the existence of agency systems to track and retrieve public records.

Plaintiff now offers his reasonable interpretation of the facts of this case as applied to the guidelines established for determination of penalties consistent with *Yousoufian.*

i. ANALYSIS OF *PRINCIPAL FACTORS*

In *West v. Thurston County*, 168 Wn. App. 162, 188-89 the Court of Appeals Division Two extensively examined and further clarified the "principal factors" established in *Yousoufian* by stating:

> "In ▶*Yousoufian* our Supreme Court established four "principal" factors for determining an appropriate daily penalty: (1) the existence or absence of a public agency's bad faith, (2) the economic loss to the party requesting the documents; (3) the public importance of the underlying issues to which the request relates and whether 'the significance of the issue to which the request is related was foreseeable to the agency'; and (4) the degree to which the penalty is an 'adequate incentive to induce further compliance' ▶*Yousoufian*, 168 Wash.2d at 460-63, 229 P.3d 735."

The existence of each of the first three[12] of the four "principal factors" is present in this claim as now outlined and the fourth is not yet relevant. **(1)** "*the existence or absence of a public agency's bad faith*", SCC has continually failed to "*timely*" respond with any responsive materials to date and has also failed to cite any legitimate exceptions justifying their continued refusal to do so all while knowing that several of the SCC mailroom staff were involved in federal Civil Rights litigation with the Plaintiff over the mailroom procedures and activities; **(2)** "*the economic loss to the party requesting the documents*", the requested materials were meant to augment the discovery process for a (time sensitive) 1983 Civil Rights complaint (*Donald Herrick V. Mark Strong, et al.*, United States District Court, Western District of Washington Case No. 3:15-cv-05779-RBL) and as such the denial of the requested materials played an significant role in the dismissal of said complaint; **(3)** *the public importance of the underlying issues to which the request relates and whether 'the significance of the issue to which the request is related was foreseeable to the agency'*, SCC is a forensic environment with a total

Conversely, **aggravating factors** that may support increasing the penalty are **(1)** a delayed response by the agency, especially in circumstances making time of the essence, **(2)** lack of strict compliance by the agency with all the PRA procedural requirements and exceptions, **(3)** lack of proper training and supervision of the agency's personnel, **(4)** unreasonableness of any explanation for noncompliance by the agency, **(5)** negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency, **(6)** agency dishonesty, **(7)** the public importance of the issue to which the request is related, where the importance was foreseeable to the agency, **(8)** any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency, and **(9)** a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case." at 467.

12 The fourth factor, being "*the degree to which the penalty is an 'adequate incentive to induce further compliance*", is not yet applicable.

confinement facility -which is exactly why the mail log exists -therefore a request for ones mail log is of foreseeable importance because of the absolute liberty interests involved with all residents potential lifetime of total confinement; and **(4)** *the degree to which the penalty is an 'adequate incentive to induce further compliance*, is not yet applicable.

ii. MITIGATING FACTORS THAT **DO NOT** APPLY:

(1) "*a lack of clarity in the PRA request*": Plaintiff's PRA request was absolutely clear and if it was not then the burden, under the PRA, was on the Defendants to seek clarification; **(2)** "*the agency's prompt response or legitimate follow-up inquiry for clarification*" there has been no adequate response by SCC to date nor was any clarification ever sought by SCC; **(3)** "*the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions*": SCC has continually failed to "*timely*" respond with any responsive materials to date and has also failed to cite any legitimate exceptions justifying their continued refusal to do so; **(4)** "*proper training and supervision of the agency's personnel*": SCC's lack of "*proper training and supervision of the agency's personnel*" has been demonstrated throughout the request timeline but most flagrantly by the fact that to date, even after this Court's Summary Judgment determination, SCC has continued to blatantly refuse to provide the requested materials; **(5)** "*the reasonableness of any explanation for noncompliance by the agency*": SCC's explanation for noncompliance was entirely inapplicable, as determined by Summary Judgment, and is thus unreasonable; **(6)** "*the helpfulness of the agency to the requestor*": SCC was not helpful in any way to the requestor/Plaintiff.

iii. AGGRAVATING FACTORS THAT **DO** APPLY:

(1) "*a delayed response by the agency, especially in circumstances making time of the essence*": this aggravating factor most certainly applies as (and as well as a "deterrence of future agency misconduct" -see *Francis v. Washington State Dept. of Corrections* (2013) 178 Wash.App. 42, 313 P.3d 457) to date SCC has never provided the requested materials which were meant to augment the discovery process for a (time sensitive) 1983 civil rights complaint (*Donald Herrick V. Mark Strong, et al.*, United States District Court, Western District of Washington Case No. 3:15-cv-05779-RBL); **(5)** "*negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency*": SCC's noncompliance with the PRA in this instant case was most certainly intentional, deliberately negligent, in bad faith and was wanton as SCC surely had no regard for Plaintiff or the PRA; **(7)** "*the public importance of the issue to which the request is related, where the importance was foreseeable to the agency*": SCC is a total confinement facility and forensic environment -which is exactly why the mail log exists -therefore a request for ones mail log is of foreseeable importance because of the absolute liberty interests involved with all residents potential lifetime of total confinement; **(8)** "*any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was*

foreseeable to the agency": SCC mail room staff, as defendants of Plaintiff's 1983 civil rights complaint (*Donald Herrick V. Mark Strong, et al.*, United States District Court, Western District of Washington Case No. 3:15-cv-05779-RBL) against SCC mailroom policies and subsequent civil rights violations, certainly knew of (thus "*foreseeable*") economic loss due to Plaintiff's lack of evidence to survive summary judgment in said known 1983 civil rights complaint; and **(9)** "*a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case*": given the fact that SCC is a total confinement facility and forensic environment and that the PRA (and all of the records under SCC's control) is therefore of obvious significant foreseeable importance because of the absolute liberty interests involved with all residents potential lifetime of total confinement SCC needs a strong deterrence to help in it's understanding of the importance of the records in order to stop future PRA violations and the subsequent personal liberty and civil rights violations. "the purpose of the PRA's penalty provision is to deter improper denials of access to public records... The penalty must be an adequate incentive to induce future compliance" *Yousoufian,* at 462-63 citing *Yousoufian v. Office of Ron Sims*, 152 Wash.2d 421, 429–30, 98 P.3d 463 (2004).

As well Defendants, in all of their filings, continually tried to marginalize and diminish Plaintiff's legitimacy and status by describing my present circumstances unceremoniously and also, in the same way, and with the same disdain, the Defendant's regularly tried to dismiss the actual content of my records requests (which all pertain in one way or another to my defense during my RCW 71.09 proceedings) by stating that they "often concern other residents or staff" and Defendants did both audaciously and with full knowledge that the PRA prohibits an agency's distinction between requestors and emphasizes the agencies lack of distinction of the actual requests as well (see RCW 42.56.080)[13]. This arrogance and the SCC's utter disregard for the rights of the residents in their care should be a factor[14] for consideration or at the very least should place a needed emphasis on the deterrent factor with the penalties determination as this same dismissive approach towards me as an individual throughout this PRA process is the same dismissive attitude that emboldened them to flout the PRA when it came to my status as a requestor in the first place.

This logic is certainly sound given the PRA's noble role in shedding light on governmental activities but especially so given both that SCC's

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13 "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request.." see RCW 42.56.080

14 See *Yousoufian,* at 469 "We emphasize that the factors may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations" (emphasis added).

residents are extremely vulnerable to governmental malfeasance and the potentially protective role that the PRA plays in an SCC residents very limited ability to protect themselves and their profound liberty interests that are *always* at stake and as such deterrence should be factored in the equation. Further:

> "Our court has stated that the PRA penalty is designed to " 'discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.' " Yousoufian **744 II, 152 Wash.2d at 429–30, 98 P.3d 463 (alteration in original) (quoting Hearst Corp. v. Hoppe, 90 Wash.2d 123, 140, 580 P.2d 246 (1978)) .... *See* Yousoufian II, 152 Wash.2d at 435, 98 P.3d 463 ("the [PRA's] purpose [of] promot[ing] access to public records ... is better served by increasing the penalty based on an agency's culpability")."

Yousoufian v. Office of Ron Sims, 168 Wash.2d 444, 459–60, 229 P.3d 735 (2010)

"Docking an agency one percent of its operating budget might be just the necessary medicine to force an agency into full PDA compliance." *Yousoufian v. Office of Ron Sims*, 152 Wash.2d 421, 429–30, 98 P.3d 463 (2004).

iii. CALCULATIONS

a. DAILY PENALTY DETERMINATION

Because 6 of the 7 (approximately 86%) mitigating factors *are* ***not*** *present* and 5 of the 9 (approximately 56%) aggravating factors *are present*, both of which are significantly beyond the half way mark of the number of *Yousoufian* factors to be considered, then it would seem that simple logic would dictate that the ultimate calculation of penalties should be well above the half way mark as well.

To make the final penalty determination Plaintiff simply averaged the percentage of aggravating factors that *were met* with the percentage of mitigating factors that *were NOT met* and came up with approximately 71 which was then, for simplification, rounded down to 70. Plaintiff then applied that percentage to the statutory $100 limit for daily penalties of PRA violations to reach a $70 dollars a day determination of penalties.

b. CALCULATION OF DAYS

The math for this calculation is a little more simple. Plaintiff simply calculated the days.

I began the calculation not from the day of my first unanswered request but rather from the date that I submitted my second request, assigned as 201605-PRR-833, which was on 05-15-2016, and then simply calculated the days since, which is **806** days (as of 08-09-2018) and counting, and I then multiplied that **806** days times the calculated daily penalty of $70 for a current total accumulation of $56,420 in daily penalties (and counting).

Again Plaintiff reasonably never pursued a second and distinct "*records grouping*" through a seperate and actionable PRA claim of SCC's willfully violative conduct with the PRA regarding Plaintiff's original **04-06-2016** request that SCC refused to ever even acknowledge.

B. Plaintiff's September 18, 2018 Filing: "*Plaintiff's Motion For Reconsideration Of "Trial Decision" Entered September 4, 2018*" (CP 593-601 [quote below specifically at 595-600])

IV. ARGUMENT

A. "'[T]he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion.' Yousoufian II, 152 Wash.2d at 431, 98 P.3d 463. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. Mayer v. Sto Indus., Inc., 156 Wash.2d 677, 684, 132 P.3d 115 (2006). A trial "court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." ' " *Id.* (quoting State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Lewis, 115 Wash.2d 294, 298–99, 797 P.2d 1141 (1990)))". (Quoted at length from *Yousoufian* [III] *v. Office of Ron Sims*, 168 Wash.2d 444, 458-59, 229 P.3d 735 (2010)). As well the Court in Yousoufian III "would adopt mitigating and aggravating factors for setting penalty for violations of PRA" *Yousoufian III* at 444. Though the Yousoufian factors (*Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 468, 229 P.3d 735 (2010)) should not infringe upon the considerable discretion of trial courts to determine PRA penalties. "At the outset of any penalty determination, a trial court must consider the entire penalty range established by the legislature ... This eliminates the perception of bias associated with presuming any "starting point" within the statutory range for penalty determinations. Such a presumption is unsupported by the PRA because its penalty provision does not prescribe how trial courts are to determine a penalty; it merely sets the minimum and maximum per day amounts." *Yousoufian III* at 466. See also Yousoufian II, 152 Wash.2d at 435, 98 P.3d 463 ("the [PRA's] purpose [of] promot[ing] access to public records ... is better served by *increasing* the penalty based on an agency's culpability") (emphasis added).

This Court made a penalty determination of a $15 a day penalty similar to that awarded *Yousoufian II* after the court there relied on *ACLU.* But *Yousoufian III* found that *ACLU* was not analogous to *Yousoufian* for very similar reasons that *ACLU* would not be analogous to the present case. In *ACLU* the Blaine School District made the records available for pick-up though refused to send the documents. SCC did not avail the records to

Plaintiff as the Blaine School District did in *ACLU* but instead negligently postulated that they were not required to create them and essentially closed the request refusing to EVER provide the requested responsive documents in ANY way to this day. This conduct is more analogous to *Yousoufian.* The penalty determination of this Court is consistent, both economically and logically, with the $15 dollar penalty assessed in *Yousoufian II* but for the same reasons both are incorrect as articulated when *Yousoufian III* corrected *Yousoufian II.* An increased penalty determination more consistent with *Yousoufian III* is therefore appropriate in this instant case.

Beyond the fact that the conduct of *Yousoufian* more closely parallels the conduct of the instant case a higher penalty determination is warranted because as stated *Yousoufian III* at 463 "In *ACLU,* the agency in question was a small school district, but here the county is the most populous county in the state". Similarly in logic here DSHS is by far the largest agency in the state and *Yousoufian* aggravating factors at #9 offer "a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case". *Yousoufian v. Office of Ron Sims,* 168 Wash.2d 444, 459, 468, 229 P.3d 735 (2010). That would indicate a penalty determination that would actually be felt by the agency and not simply a penalty determination comparable to a small rounding error in the agency's vast budget.

Certainly here the "deterrent" factor looses even what little teeth it has due to the fact that as a pro se litigant DSHS/SCC has no accompanying legal fee obligation, often the biggest part of the financial burden/deterrent from a judgment, and though *legal fees* are not necessarily a part of the "penalty" it certainly is part of the "deterrence", even if only unofficially, and as such should be a factor when considering penalty determinations. How a $12,090 judgment is to deter an agency with a multi-billion dollar budget is beyond the comprehension of this pro se litigant.

Even if the above *legal fee* consideration is not entirely consistent with the law Plaintiff, previously, under his "Analysis Of *Principal Factors*" (p. 4 of Plaintiff's Motion For Penalty Determination Pertaining To Claims Under Request 201605-PRR-833) stated "and **(4)** *the degree to which the penalty is an 'adequate incentive to induce further compliance*, is not yet applicable"[15] while "not yet applicable" was meant more for any potential appellate stage it now seems applicable during Reconsideration.

Defendant's, specifically SCC, a forensic institution, have a long history of stifling and diminishing the PRA while knowing full well the extreme liberty interests at stake for the residents of SCC who are in a constant state of legal purgatory, often for decades, and who are often the requestors and the subjects of the documents that Defendants safeguard

15 Quoting *West v. Thurston County,* 168 Wn. App. 162, 188-89 discussing the *Yousoufian* Principal Factors "(4) the degree to which the penalty is an 'adequate incentive to induce further compliance' *Yousoufian III*, 168 Wash.2d at 460-63, 229 P.3d 735."

documents that are unique to Defendants agency and are even more significant to SCC residents than are Department Of Corrections documents to prisoners whose fate is already determined upon entering the penal system.

With all due respect, and considering the significance of the documents and the forensic nature of the SCC SCC's continuous flouting of the PRA must be more thoroughly deterred than the present $12,090 award has the teeth to accomplish. "Docking an agency one percent of its operating budget might be just the necessary medicine to force an agency into full PDA compliance." *Yousoufian v. Office of Ron Sims*, 152 Wash.2d 421, 429–30, 98 P.3d 463 (2004).

As well the PRA, through both case law (see *Delong v. Parmalee* (2010), 157 Wash. App. 119, 236 P.3d 936, review granted, cause remanded 171 Wash. 2D 1004, 248 P.3d 1042, on remand 164 Wash. App. 781, 267 P.3d 410) and statute (see RCW 42.56.080) disallows the distinction of requestors. It is hard to imagine the Seattle Times or KIRO News being awarded a penalty of $12,090 under the same set of circumstances as Plaintiff which lend to concerns with damages so inadequate as unmistakably to indicate that the verdict must have been the result of prejudice (against someone in my situation) listed under CR 59(a)(5).

B. To summarize above Plaintiff respectfully requests the Court to reconsider its penalty determination consistent with CR 59 on the grounds that **(1)** there was an abuse of discretion; **(2)** damages were so inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice; **(3)** there is no evidence or reasonable inference from the evidence to justify the verdict or the decision; **(4)** there is an error in law; and **(5)** substantial justice has not been done.

First, there was an **abuse of discretion.** For an agency with with a yearly budget of several billion dollars (DSHS) or even $50 million (SCC)[16] *"[T]he degree to which the penalty is an adequate incentive to induce further compliance"* is well above a nearly non-existent and insignificant $12,090 award. *Yousoufian* establishes as an aggravating factor to increase the daily penalty determination "a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case". *Yousoufian v. Office of Ron Sims*, 168 Wash.2d 444, 468, 229 P.3d 735 (2010). "Docking an agency one percent of its operating budget might be just the necessary medicine to force an agency into full PDA compliance." *Yousoufian v. Office of Ron Sims*, 152 Wash.2d 421, 429–30, 98 P.3d 463 (2004). This Courts penalty determination is demonstrably not significant enough to deter future PRA violations. CR 59(a)(1).

Second, **damages were so inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice** against Plaintiff's and his circumstances because the Seattle Times or KIRO

16 The source for the budget of SCC is the July 29, 2018 Tacoma News Tribune Op-Ed entitled "*Holding Sex Predators On Island Wastes Public Money*".

News would never have been awarded a penalty of $12,090 under the same PRA violations as the Plaintiff. CR 59(a)(5).

Third, the filings and testimony firmly **establish that all evidence and inferences clearly favor the Plaintiff's claims** that the awarded a penalty of $12,090 is too insignificant to be a deterrence to Defendants under the facts of the case and an awarded a penalty of $12,090 **is contrary to law**. CR 59(a)(7).

Fourth, consistent with Plaintiff's filings and testimony, the PRA and all of the relevant case law (dealing with penalty determination etc.) that was either cited by Plaintiff in his filings and/or at oral argument, clearly **establish an error in law** with regards to this Courts penalty determination. CR 59(a)(8).

Lastly, **substantial justice has not been done** because the Defendants, caretakers of public records with potentially very significant liberty interests for individuals facing a potential lifetime of total confinement under RCW 71.09, willfully and illegitimately withheld the *significant and legitimate* requested records from the Plaintiff on this claim but further aggravating the situation is that the SCC has an ongoing history of this same conduct and thus far more impactful penalties and/or settlements, made to others, have failed to have any deterrent affect on their conduct. "The penalty must be an adequate incentive to induce future compliance" *Yousoufian III* at 463. CR 59(a)(9).

For the above reasons the penalty determination is inadequate and Plaintiff respectfully and humbly requests the Court to reconsider and increase the penalty determination of its ruling.

In this case the trial court identified the defendant's list of what they offered as applicable nonexclusive mitigating factors but abused its discretion by not addressing any of the factors presented by defendant, whether mitigating or aggravating. (CP 591-92). See *Eggleston v. Asotin County*, 1 Wash.App.2d 1045, 1050 (2017) -unpublished (utilizing GR 14.1) where it states that the trial "court correctly identified the applicable nonexclusive aggravating and mitigating factors. It did not improperly focus on one factor to the exclusion of others". Sergent v. Seattle Police Dep't, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013).

As well the trial court's determination of only $15 dollar a day penalty is manifestly inadequate and of such a low penalty amount, after factoring in all of the facts of the case and then scrutinizing the facts through the lens of guidance provided by *Yousoufian*, as to be outside the broad realm of reasonableness and that no reasonable person would make. See *Yousoufian II* at 458-59. The decision would begin to be more reasonable if the penalty amount under RCW 42.56 were 0 to 50 dollars or less but with a penalty range of 0 to 100 dollars it is hard to imagine what it would take for the trial court to ever award a full penalty amount of $100 a day. In *Yousoufian v. Office of Sims*, 165 Wash.2d 439, 456 (2009), this Court stated:

> To conclude, the trial court on remand recognized King County's grossly negligent noncompliance with the PRA but failed to impose a penalty proportionate to King County's misconduct, imposing instead a penalty at the extreme low end of the penalty range. As recognized in *Yousoufian II* such a low penalty is inappropriate and manifestly unreasonable in light of King County's extreme misconduct. Yousoufian II, 152 Wash.2d at 439, 98 P.3d 463.

The above "extreme low end of the penalty range" addressed was $15 dollars a day -the ***exact*** penalty amount in question in this case.

Beyond the penalty amount in this case being the exact same amount as was in question in *Yousoufian* (2009) it is also under similar aggravating/mitigating circumstances as the circumstances thoroughly outlined in the record by Plaintiff (CP 484-490).

As well the deterrent effect towards DSHS, *by far* the largest state agency, is negligible at a mere $15 a day penalty. The trial court did abuse

its discretion in determining such a low penalty amount under all of the circumstances.

I. SUMMARY OF 201605-PRR-833

The court in *Yousoufian V* concluded that a penalty *"must* be an adequate incentive to induce future compliance". 168 Wn.2d 444, 463 (emphasis added). The court also noted that the deterrent effect of a penalty may vary based on the size of the agency. *Id.* Applying these principles, the court held that the $15 per-day penalty awarded by the trial court was an abuse of discretion because it was not proportionate to the agency's misconduct, which it characterized as "grossly negligent noncompliance with the PRA." *Id.* The Supreme Court set the penalty at $45 per day.

Due to the circumstances of this case, and both SCC/DSHS's size and intransigence with this case, the trial court's daily penalty determination was 1) wholly inadequate; and 2) would fail to serve as a future deterrent and as such was clearly an abuse of discretion.

G. COSTS

Plaintiff requests this Court to award fees and costs under RAP 14. Pursuant to RAP 14.1 the appellate court, which accepts review and makes final determination (RAP 14.l(b)), decides costs in all cases (RAP 14. l(a)). If Plaintiff is a prevailing party in this cause of action, Plaintiff respectfully requests this Court to award him fees and costs for this appeal. See *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 727, 81

P.3d 111 (2003). It should be noted that Plaintiff is not requesting attorney fees. However the PRA's attorney fee provision reads:

> Any **person** who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time **shall be awarded all costs**, *including reasonable attorney fees* , incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550 (4) (emphasis added).

H. CONCLUSION

Due to the numerous outlined examples of the trial court clearly abusing its discretion the Court should **1)** reverse the trial court's summary judgment for claims under request **201512-PRR-889**; and **2)** either simply implement appropriate daily penalties for claims under **201605-PRR-833**; or **3)** remand back to the trial court for a more appropriate daily penalty for claims under **201605-PRR-833**; and/or **4)** remand back to the trial court to better address Plaintiff's (aggravating factors) filings for a more appropriate daily penalty for claims under **201605-PRR-833**; and/or **5)** all other available relief that this Court deems just should be implemented and granted.

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I, the below signed, swear under penalty of perjury that I am at least 18 years of age, with knowledge and ability to competently testify to the matters set forth herein, and that the the foregoing statements made in the above are true and correct to the best of my own personal knowledge and are sworn to in accordance with the laws of the state of Washington.

DATED this 26th day of March, 2019.

Respectfully submitted,

By _____

Signed at Pacific Washington, King County

Donald Herrick
donaldherrick15@gmail.com
206 Third Ave. N.W.
Pacific, WA 98047
253-670-2712

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DONALD HERRICK Plaintiff (Pro se), v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS) and the SPECIAL COMMITMENT CENTER (SCC) Defendant(s).	Appeal No. 52744-8-II AFFIDAVIT IN SUPPORT OF APPELLANT'S MOTION FOR AN EXTENSION OF TIME (Pierce County Superior Court No. 17-2-08077-8)

I, DONALD HERRICK, being duly sworn, deposes and says:

1. **09-27-2018** I received the denial of my "*Plaintiff's Motion For Reconsideration Of "Trial Decision" Entered September 4, 2018*" by Pierce County Superior Court Judge Honorable G. Helen Whitener.
2. **10-11-2018** I author, file and send copies of "*Plaintiff's Notice Of Appeal*" to all parties.
3. **10-23-2018** I receive an emailed copy (via SCC staff) from AAG Byrne of Defendnat's "*DSHS/SCC's Notice Of Cross-Appeal To Court Of Appeals, Division II*".
4. **March 26th, 2019** I author and send copies of the following:

Donald Herrick –Pro se
206 Third Ave. N.W.
Pacific, WA 98047

1. Appellant's Opening Brief

2. Affidavit In Support Of Appellant's Opening Brief

to the following:

Court of Appeals -Division II 950 Broadway Suite 300 Tacoma, WA 98402	Office of the Attorney General Attn: Lindsay Byrne 7141 Cleanwater Drive SW P.O. Box 40124 Olympia WA, 98504-0124

I, the below signed, swear under penalty of perjury that I am at least 18 years of age, with knowledge and ability to competently testify to the matters set forth herein, and that the the foregoing statements made in the above are true and correct to the best of my own personal knowledge and are sworn to in accordance with the laws of the state of Washington.

DATED this 26th day of March, 2019.

Respectfully submitted,

By _____

Signed at Pacific, Washington, King County

Donald Herrick
donaldherrick15@gmail.com
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Pacific, WA 98047
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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DONALD HERRICK Plaintiff (Pro se), v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS) and the SPECIAL COMMITMENT CENTER (SCC) Defendant(s).	Appeal No. 52744-8-II APPELLANT'S DECLARATION OF SERVICE (Pierce County Superior Court NO. 17-2-08077-8)

DONALD HERRICK declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

1. I am an untrained Plaintiff pro se in a PRA violation action (per RCW 42.56).
2. On March 26th, 2019 I author and send via U.S. mail[1] copies of the following:
   - Appellant's Opening Brief
   - Affidavit In Support Of Appellant's Opening Brief

to the following:

1 At 3:00 PM I call case manager Harper to ask about a formatting issue that I am having with converting my electronic files to PDF and am told that I can simply print the filings and get them in the mail by the close of the business day and that they will be accepted. In a good faith effort to comply with the Court Rules I choose the U.S. mail route rather than risk having my filings not be formatted to the Court of Appeals specifications.

Donald Herrick –Pro se
206 Third Ave. N.W.
Pacific, WA 98047

Court of Appeals -Division II 950 Broadway Suite 300 Tacoma, WA 98402	Office of the Attorney General Attn: Lindsay Byrne 7141 Cleanwater Drive SW P.O. Box 40124 Olympia WA, 98504-0124

I, the below signed, swear under penalty of perjury that I am at least 18 years of age, with knowledge and ability to competently testify to the matters set forth herein, and that the the foregoing statements made in the above are true and correct to the best of my own personal knowledge and are sworn to in accordance with the laws of the state of Washington.

DATED this 26th day of March, 2019.

Respectfully submitted,

By _____

Signed at Pacific, Washington, King County

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